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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 710

AMANA REFRIGERATION, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Amana Refrigeration, Inc. (hereinafter referred to as "Amana") prays that a Writ of Certiorari issue to review the judgment entered on October 20, 1959 by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported, sub. nom. *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, in 271 F. 2d 257 (Adv. Sheet No. 2, December 14, 1959) and is printed in its entirety in Appendix "A" hereto. The order of the District Court dismissing Amana's "First Cause of Action" (the claim based on an alleged violation of the Robinson-Patman Act), as

well as its order directing the entry of final judgment as to such order of dismissal, is printed in its entirety in the Appendix (attached to Amana's Brief) filed by Amana in the Court of Appeals, nine additional copies of which have been filed with this Petition pursuant to Rule 21(4) of the Rules of this Court.

JURISDICTIONAL GROUNDS

The judgment order of the Court of Appeals, printed in Appendix "B" hereto, was entered on October 20, 1959. A timely petition for rehearing was filed by Amana, and an order denying said petition, printed in Appendix "C" hereto, was entered on November 24, 1959. The jurisdiction of this Court is invoked under Title 28 U.S.C., § 1254 (1) and under Title 28 U.S.C., § 1651.

QUESTIONS PRESENTED

1. Does the absence of an affirmative showing that an appeal from a Rule 54(b) order involves an "infrequent harsh case" justify the dismissal of the appeal on the ground that the district court abused its discretion in entering the Rule 54(b) order?

2. Is Section 2(a) of the Robinson-Patman Act applicable to discrimination in the sale of television time by the television networks?

STATUTE AND RULE INVOLVED

The statute and rule involved on this appeal are Rule 54(b) of the Federal Rules of Civil Procedure and Section 2(a) of the Robinson-Patman Act, Title 15 U.S.C. § 13(a), 49 Stat. 1526 (1936).

Section 2(a) of the Robinson-Patman Act is printed in its entirety in Appendix "D" hereto.

Rule 54(b) of the Federal Rules of Civil Procedure reads as follows:

> "(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

STATEMENT OF THE CASE

This suit was brought by Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS") against Amana to recover damages for an alleged breach of certain agreements between Amana and CBS relating to Amana's sponsorship of "The Phil Silvers Show" over the CBS television network. At the time of answering the CBS complaint, Amana filed a counterclaim (Court of Appeals Appendix, pp. 8-14) alleging three claims under the Federal anti-trust laws, such claims being designated, respectively, as the First, Second and Third "Cause of Action." CBS filed a reply to both the Second and Third Causes of Action which allege certain "tying" practices on the part of CBS violative of both Section 1 of the Sherman Act and Section 3 of the Clayton Act. These two claims are still before the District Court, no pre-trial discovery or other

proceedings having been had as yet with respect to such claims.

The First Cause of Action of Amana's counterclaim is based on an alleged violation of Section 2(a) of the Robinson-Patman Act. Its basic allegations may be paraphrased as follows: (1) Pursuant to a CBS form agreement, Amana purchased television time from CBS for the purpose of sponsoring "The Phil Silvers Show" over the CBS network; (2) at or about the time of Amana's sponsorship of "The Phil Silvers Show", certain competitors of Amana also purchased television time from CBS for the purpose of sponsoring programs over the CBS network; (3) the network television time purchased by both Amana and such competitors was "prime" or evening time, designated by CBS, for purposes of determining its sales price, as "Class A" time; (4) such competitors of Amana were charged substantially less for such television time than Amana; (5) as a result of such discrimination, competition in the business engaged in by Amana and such competitors was substantially lessened, and the competition between Amana and such competitors was injured; and (6) as a further result of such discrimination, Amana was injured in its business and suffered substantial damages.

CBS filed a motion to dismiss this First Cause of Action on the ground that it failed to state a claim upon which relief could be granted. Upon a consideration of the briefs filed by the parties in connection with that motion, the District Court entered an order (Court of Appeals Appendix, p. 26-27) dismissing Amana's claim on the ground that television time is not a "commodity" as that term is used in the Robinson-Patman Act.

Subsequently, the District Court, having expressly determined *after an examination of the briefs of both parties*

on the Rule 54(b) issue that there was no just reason to delay the appeal of Amana's First Cause of Action, entered a "certification" order (Court of Appeals Appendix, pp. 28-29) directing that final judgment be entered as to such dismissal. It was from that order that the appeal was taken. After the appeal was docketed, CBS filed a motion to dismiss the appeal on the ground that the District Court improperly entered the Rule 54(b) order. After briefs limited to this procedural question had been filed by both parties, the Court of Appeals ordered that the CBS motion to dismiss the appeal be continued and taken with the case on its merits.

After hearing the appeal on its merits—extensive briefs on the "commodity" question having been filed by both parties—the Court of Appeals, without discussing the merits, dismissed the appeal because of an asserted lack of appellate jurisdiction. While the Rule 54(b) issue primarily argued by both parties was whether the lawsuit involved but a single claim (as CBS contended) or whether (as Amana contended) the First Cause of Action of the counterclaim—the Robinson-Patman Act claim—was an independent "claim for relief" (Chief Judge Hastings in his dissent specifically found Amana's First Cause of Action to be a separate claim for relief), the decision of the Court of Appeals was predicated solely on the holding that the District Court *abused its discretion* in certifying that there was "no just reason for delay" in entering its appealable order. Having thus dismissed the appeal, the Court of Appeals remanded the cause to the District Court with directions to vacate its order entered under Rule 54(b).

The mandate of the Court of Appeals has been stayed pending Amana's application for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN THE SEARS, ROEBUCK CASE.

The definitive interpretation of amended Rule 54(b) was laid down by this Court in *Sears, Roebuck and Co.* v. *Mackey*, 351 U.S. 427, 76 S. Ct. 895 (1956). The complaint involved in the *Sears, Roebuck* case was divided into four counts, the first two of which were dismissed by the district court. Count I of the complaint was based on a violation of the Sherman Act and rested in part on some of the same facts that were involved in counts III and IV, the latter two counts alleging unfair competition claims which remained unadjudicated at the time of the district court's certification order. The defendant-appellee filed a motion to dismiss the appeal for lack of appellate jurisdiction, and the Court of Appeals for the Seventh Circuit, speaking through Judge Duffy (then Chief Judge), upheld its jurisdiction (218 F. 2d 205 (1955)). This Court affirmed, and its opinion provided the much-needed clarification of the law under Rule 54(b), both as to what constitutes a separate "claim for relief",[1] and, what is more important for purposes of this Petition, the standard that should be applied in judging the propriety of a district court's exercise of discretion in "dispatching" a claim for immediate appeal.

By describing the only available ground for such a motion to dismiss for lack of appellate jurisdiction, this Court

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1. It appears as though the Second Circuit has declined to follow the *Sears, Roebuck* "basis of liability" test with respect to what constitutes a separate "claim for relief" under Rule 54(b); see *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.*, 243 F. 2d 795 (1957); *Schwartz* v. *Eaton*, 264 F. 2d 195 (1959); and *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp.*, 267 F. 2d 178 (1959).

set forth the requirements for a proper "certification" order under Rule 54(b):

> "The grounds for such a motion ordinarily might be (1) that the judgment of the District Court was not a decision upon a 'claim for relief', (2) that the decision was not a 'final decision' in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order." (351 U.S. at 436.)

In the following paragraph of its opinion, this Court answered each of these contentions and held that all of the requirements for a proper Rule 54(b) order had been met in that case. As to the first two requirements, this Court held:

> "In the case before us, there is no doubt that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b), or that their dismissal constitutes a 'final decision' on individual claims." (Ibid.)

The following two sentences of the opinion take up the third requirement, that relating to the propriety of a district court's exercise of discretion. This Court's holding on that point *should have been controlling as to the instant case:*

> "Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly *can* be decided independently of each other." (Ibid.; emphasis by this Court.)

There is a direct conflict between the standard thus established in the *Sears, Roebuck* case and the standard applied

by the Court of Appeals in the instant case. After quoting at length from *Panichella* v. *Pennsylvania Railroad Co.*, 252 F. 2d 452 (3rd. Cir. 1958)—a case inapposite because it involved a *contingent* third-party claim—the Court below evaluated the instant case by the standard applied in the *Panichella* case, i.e., the "infrequent harsh case" rule. Stating that the appeal would delay the trial of the principal claim—a statement which is clearly shown to be erroneous by Chief Judge Hastings in his dissent—the Court below simply held:

> "The instant case presents no hardship of unfairness which would justify discretionary departure from the normal rule as to the time of appeal." (271 F. 2d at 259.)

The conflict of this decision with the *Sears, Roebuck* decision is twofold. First, the standard applied by this Court was solely in terms of the "inherent separability" of the claims involved in the case, while the standard adopted by the Court below was solely in terms of the "infrequent harsh case". The factors of "infrequency" or "harshness" were not even mentioned by this Court in *Sears, Roebuck*, and, conversely, the Court below, in dismissing the appeal, completely disregarded the inherent separability of Amana's claims.

The second conflict between the decision of the Court below and the *Sears, Roebuck* decision is related to the first and is, perhaps, even more important from the standpoint of proper appellate procedure. This second conflict has to do with the approach of an appellate court to an asserted abuse of discretion by a lower court. The approach taken by this Court in *Sears, Roebuck* is consistent with the well established principle that an appellate court, in reviewing a discretionary act, cannot merely substitute its consid-

ered judgment for that of the lower court, but may reverse only if the lower court's action was so arbitrary as to constitute an *abuse* of its discretion.[2]

In contrast to this Court's viewpoint as to the proper scope of review of a district court's discretionary Rule 54(b) order (the question of *power* of review is not involved here), the Court below is apparently of the opinion that its scope of review of such orders is unlimited. The standard adopted by the Court below embodies what amounts to a presumption of an improper exercise of discretion *unless* there is an affirmative showing that the district court's discretion was *not* abused. The adoption of such a standard not only conflicts with the principle of *narrow* scope of review as to a lower court's discretionary orders, but, more particularly, is in conflict with the precise language of Rule 54(b). The Rule requires a determination that "there exists no just reason for delay," and such a determination is far different from that apparently required by the Court below, i.e., that there exists an extraordinary reason *not* to delay.

That the Court below approaches Rule 54(b) appeals with what is tantamount to a presumption of invalidity is corroborated by *Gass* v. *National Container Corp.*, 271 F. 2d 231 (7th. Cir. 1959), a case decided by the Seventh Circuit ten days after the case at bar. The opinions in both cases contain the same lengthy quotations from the Third

2. The operation of Rule 54(b) must be carefully distinguished from the operation of the recently-enacted interlocutory appeals statute (28 U.S.C. §1292(b)). Under Rule 54(b) procedure (where the appeal is taken pursuant to 28 U.S.C. §1291) a court of appeals *must* review the case, assuming that the other two requirements of Rule 54(b) are met, *unless* it determines that the district court has abused its discretion, while under Section 1292(b) procedure the court of appeals *may, in the exercise of its own discretion*, accept the appeal or decline to review the case. This distinction is pointed up *In Re Heddendorf*, 263 F.2d 887 (1st Cir. 1959).

Circuit's *Panichella* case. (It is interesting to note that in a later case, *Simmonds Accessories v. Elastic Stop Nut Corporation*, 257 F. 2d 485 (1958), the Third Circuit did not even refer to the "infrequent harsh case" rule and upheld its appellate jurisdiction even though the claims involved in the case were factually identical.) The sole basis for the Court's holding of abuse of discretion in the *Gass* case is as follows:

> "Application of the above standard to the instant case clearly indicates that it was not an appropriate one for entering a special order under Rule 54(b). There is nothing which establishes the existence of any hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal." (271 F. 2d at 233.)

From the opinions in the instant case and the *Gass* case viewed together significantly, the Rule 54(b) issue was not raised in the *Gass* case in any brief or motion nor was there any discussion of the issue on oral argument—it is clear that the Court below has, in effect, adopted a presumption of invalidity as to all Rule 54(b) appeals. The *Gass* opinion contains no basis for the holding of an abuse of discretion other than an *absence* of an *affirmative* showing of hardship. And the only positive basis for the Court's holding in the instant case was its finding that the appeal would delay the trial of the principal claim, a finding which had no supportable basis in fact. In net effect, the Court below merely substituted its judgment for that of the District Court, despite the fact that the District Court carefully examined the briefs of both parties before granting Amana's motion for a certification order. We submit that such an approach to the review of a district court's exercise of discretion in entering a Rule 54(b) order is in direct conflict with the view of this Court expressed in *Sears, Roebuck*.

As an additional reason for granting the Writ, a review of the decision of the Court below is important because it is in conflict with the Federal policy regarding piecemeal appeals. This is so because the Court's decision virtually assures a second appeal *on precisely the same legal question* that is involved in Amana's First Cause of Action. This second appeal will be taken after Amana's second and third causes of action have been disposed of in the District Court. If Amana is successful on this second appeal, the case will then have to be remanded for a trial on Amana's First Cause of Action, for the essential evidence in support of the First Cause of Action will be irrelevant and thus inadmissible at the trial of Amana's two other claims, and, by the same token, the essential evidence in support of Amana's other two claims will not be relevant to the First Cause of Action.[3] After this second trial on Amana's First Cause of Action, there remains the probability of a *third appeal* by the party that is defeated with respect to that claim. The *hardship* inherent in this prospect of three appeals and two trials could have been—and can be if this Court grants this Petition—reduced to a maximum of two appeals and one trial simply by the *disposition* of the appeal which has been fully briefed and argued before the Court below. To do so, we submit, would have been in full accord with, *and in furtherance of*, the well-established Federal policy regarding piecemeal appeals. And, as stated by Chief Judge Hastings in his dissent (271 F. 2d at 201):

[3] For example, proof of injury to competition under Amana's First Cause of Action—the price discrimination claim—involves evidence as to the competition between Amana and its competitors, while the necessary proof of injury to competition under Amana's second and third causes of action—the two "tying contract" claims under the Sherman and Clayton Acts—involves evidence relating to competition among television station owners, on the one hand, and competition among television program producers, on the other hand.

"To do so is to give effect to the plain import of the holding in Sears, Roebuck Co. v. Mackey, supra."

II. THE WRIT SHOULD BE GRANTED BECAUSE THE QUESTION OF WHETHER TELEVISION TIME IS A "COMMODITY" FOR PURPOSES OF THE CLAYTON AND ROBINSON-PATMAN ACTS IS AN IMPORTANT QUESTION UNDER THE FEDERAL ANTI-TRUST LAWS THAT SHOULD BE DECIDED BY THIS COURT.[4]

The illegality of price discrimination in the form of quantity discounts has for some time been settled law. That such discrimination, being inescapably injurious, is violative of the Robinson-Patman Act was established by this Court in *F.T.C. v. Morton Salt Company*, 334 U.S. 37, 68 S. Ct. 822 (1948).

CBS, as well as the other major television networks, has engaged for many years in such a quantity discount practice, and Amana, as one of the sponsors of "The Phil Silvers Show", was one of the victims of this discrimination. In answer to Amana's claim for damages, the primary

4. While the Court below did not decide this question, even though it was fully briefed and argued before it, the precedents clearly demonstrate that this Court may properly do so in the interests of expedition:

> "In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and the litigation already has covered a considerable period." (*Cole* v. *Ralph*, 252 U.S. 286 at 290, 40 S. Ct. 321 at 324 (1920).)

See also *Storey Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248 (1931) and *Ecker* v. *Western Pac. R. R. Corp.*, 318 U.S. 448, 63 S. Ct. 692 (1943).

contention of CBS is that its pricing system, although discriminatory, is nevertheless not proscribed by the Robinson-Patman Act because television time is not a "commodity". CBS argues that a "commodity", as that term is used in Section 2(a) of the statute, refers only to tangibles and does not, therefore, include the broadcast time sold by the networks to their customers, the sponsors of its programs.

The issue of whether the applicability of the Robinson-Patman Act is dependent upon the distinction between tangibles and intangibles is one of extreme importance under the Federal anti-trust laws. The question is purely one of statutory construction and is important, not only from the standpoint of resolving a fundamental ambiguity, but from the standpoint of the efficacy of our anti-trust statutes. Moreover, the "commodity" issue involves the underlying philosophy of the price discrimination statute—the principle of equal treatment of customers competing in the market place. The duty of construing legislation in keeping with its basic purposes is, of course, incumbent upon the courts, and when the statute in question is one of the most important laws governing the nation's economic system, the ambiguity should, and must, ultimately, be resolved by this Court.

But the importance of this "commodity" question is not limited to underlying anti-trust philosophy and the efficacy of our laws governing competition. Its importance stems also from the far-reaching consequences—the "precedential value"—of a final decision as to the meaning of the statute. Although the instant case is obviously a matter of great concern to Amana (the amount of the discrimination between Amana and its competitors being approximately $225,000.00), Amana is but one of a great many

companies that have purchased and will purchase television time under the sharply graduated quantity discount schedule of the networks. On oral argument before the Court of Appeals, counsel for CBS alluded to the "floodgates" of litigation that would be opened by a decision in favor of Amana. While the accuracy of this statement is a matter of conjecture, it clearly demonstrates that this question is one of utmost importance to the radio and television networks, and also to those claimants who would gain access through such "floodgates" to the recoveries that would undo the damage they incurred as a result of such discrimination.

However important to the radio and television industry, this "commodity" question is of even greater importance to the newspaper and publishing industry. The legal question under the Robinson-Patman Act is the same whether advertising space or television time is involved, and selling newspaper and magazine space on a quantity discount basis is common practice.

The problem, moreover, is not limited to price discrimination but extends to such practices as tie-in sales, requirements contracts and other exclusive dealing devices proscribed by Section 3 of the Clayton Act (15 U.S.C. § 14), for the term "commodity" appears in that Section as well as Section 2(a). If advertising space and television time are not "commodities", then the various media of communication may engage in price discrimination, tie-in selling, and exclusive dealing practices with complete immunity from the prohibitions of the Clayton and Robinson-Patman Acts.

Most of the current cases involving the "commodity" issue have been brought under Section 3 of the Clayton Act. Following the consent decree entered in *U. S.* v.

Wichita Eagle Publishing Co., Inc., C.C.H., 1959 Trade Cases, Par. 69,400 (D. Kansas, 1959), a competing newspaper brought suit against that defendant in the same court alleging the same violation. *Beacon Newspaper Corporation, Inc.* v. *Wichita Eagle Publishing Co., Inc.*, Civil Action No. W-1937. The district court in the case brought by the government enjoined tie-in sales of advertising, and the decree stated that the complaint stated a claim for relief under the Clayton Act as well as the Sherman Act, a legal conclusion which could be true only if advertising were a "commodity". The issue of whether advertising is a "commodity" under Section 3 of the Clayton Act has been specifically raised in the treble damage case on the defendant's motion to dismiss the complaint. This motion is now pending before that court.

The same issue was raised in *News, Inc.* v. *Lindsay Newspapers, Inc.*, et al, Civil Action No. 3478, a case now pending in the District Court for the Southern District of Florida, Tampa Division. The defendant's motion to dismiss was predicated, in part, on the non-applicability of the Clayton Act to sales of advertising space. The defendant's motion was denied but the court did not write an opinion.

In *Scott Publishing Co., Inc.* v. *Columbia Basin Publishers, Inc.*, et al, C.C.H., 1959 Trade Cases, Par. 69,589, (W.D. Wash., 1959) the court made no holding on this question but, on the last page of its opinion, expressed doubt as to whether advertising space was a "commodity":

> "While there is considerable doubt in the Court's mind whether newspaper advertising is a 'commodity' within the meaning of the Robinson-Patman Act, or 'goods, wares, merchandise, or other commodity' within the meaning of the Clayton Act, decision of that question is unnecessary in this case in view of the Court's find-

> ing that there were no price discriminations by Columbia Basin News in the sale of advertising which had the effect of lessening competition or tended to create a monopoly or injure, destroy or prevent competition; and that there were no sales of advertising, or prices fixed for advertising, upon any agreement or understanding that the purchaser would not advertise in the Tri-City Herald."

One can predict with certainty that this "commodity" question will be raised with increasing frequency in the various Federal courts of the country until it is finally resolved by this Court. An early adjudication of the issue would, therefore, enhance the efficient and orderly administration of justice in such anti-trust litigation.

The importance of this anti-trust issue from the standpoint of judicial administration is underscored by the fact that the decision of this Court in *Times Picayune Publishing Co.* v. *U.S.*, 345 U.S. 594, 73 S. Ct. 872 (1953) was relied on by the plaintiffs in both the *News, Inc.* and *Wichita Beacon* cases in support of their position that tie-in selling of advertising space was proscribed by the Clayton Act. Amana, too, in its brief before the Court of Appeals, contended that an analysis of that decision led to the conclusion that this Court was of the opinion that advertising space was a "commodity". It is clear, however, that this Court did not expressly rule on that issue in *Times-Picayune*, a fact alluded to by the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 (2nd. Cir. 1956):

> "The correctness of the dismissal of this cause of action raises, however, important and *apparently unresolved questions under the Clayton Act*. Thus the Supreme Court reserved in the *Times-Picayune* case the question whether advertising space is a 'commodity' within the meaning of Section 2 of the Act. See 345 U.S. at page 610, note 27, and cases cited." (236 F. 2nd at 527; emphasis added.)

The question of whether discriminatory sales of *radio* broadcast time are prohibited by the *Robinson-Patman* Act amendment to the Clayton Act is now pending in the *Syracuse* case.

The "commodity" issue was not a necessary element of the *Times-Picayune* decision. It is essential to the case at bar and must ultimately be decided. Amana's Petition presents this Court with an opportunity to decide conclusively the question "reserved" in *Times-Picayune*, so that the Federal courts, as well as the many advertiser and media litigants, present and potential, can be apprised of the law and guide themselves accordingly.

For all of the reasons stated above, the "commodity" issue is one of the most important unanswered issues under the Federal anti-trust laws today and should, therefore, be decided now by this Court.

CONCLUSION

For each of the foregoing reasons, we earnestly urge that this Petition be granted and that this Court's writ of certiorari issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

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Dated February 12, 1960

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959—SEPTEMBER SESSION, 1959.

No. 12669.
COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellee,
v.
AMANA REFRIGERATION, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 20, 1959

HASTINGS, *Chief Judge*, PARKINSON and CASTLE, *Circuit Judges*, delivered the opinion of the court:

CASTLE, *Circuit Judge*. Columbia Broadcasting System, Inc., plaintiff-appellee (CBS) brought a diversity action against Amana Refrigeration, Inc., (Amana) for $284,545.21 alleged to be due under agreements for the production and broadcasting of a television program by CBS under Amana's sponsorship over certain broadcasting stations affiliated with the CBS television network. Amana's answer contained a counterclaim setting forth three alleged anti-trust law violations by CBS in connection with the transactions upon which the action brought by CBS was predicated. The counterclaim charged that Amana was damaged by alleged action of CBS (1) granting greater

discounts to favored advertisers, competitors of Amana, in violation of 15 U.S.C.A. §13 (a), (2) requiring as a condition of the broadcasts that Amana agree to sponsor the program over a specific group of television stations designated by CBS in violation of 15 U.S.C.A. §1 and §14, and (3) requiring as a condition of the broadcasts that Amana agree to sponsor a program in which CBS had a financial interest in violation of 15 U.S.C.A. §1 and §14. Treble damages were sought.

CBS moved to dismiss the first of the three parts of the counterclaim on the ground that 15 U.S.C.A. §13 (a) was inapplicable. It filed a reply to the balance of the counterclaim. The District Court found for CBS on its motion to dismiss and entered an order of dismissal as to the "first cause of action of the counterclaim". Thereafter, Amana applied to the District Court for a certification pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, declaring that there is "no just reason for delay" and moving the court to direct the entry of "final judgment". The District Court granted Amana's application for certification over the objection of CBS. Amana filed its notice of appeal from the order of dismissal. CBS filed a motion to dismiss the appeal on the grounds that the order below was not a final order and that the requirement of Rule 54 (b) that there be no just reason for delay is not satisfied. The motion to dismiss the appeal was taken with the case.

The District Court's determination does not preclude review by us, *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427. Apart from consideration of the question of whether the part of the counterclaim dismissed constituted a "claim for relief" within the meaning of Rule 54 (b), it is our opinion that the District Court's determination that there was no just reason for delay was an abuse of discretion.

The question of whether there was a basis for the determination by the District Court that there is no just reason for delaying review of the dismissal of the portion of the counterclaim until after final judgment had been rendered on the claim of CBS and the other parts of Amana's counterclaim must be determined in the light of the traditional, deeply-rooted and wisely sanctioned principle against piecemeal appeals. Rule 54 (b) is designed to make an accommodation between that policy and the problems of the timing of review which have arisen under the liberalized joinder of claims, counterclaims, crossclaims and third party claims in one suit permitted by modern procedural rules. In this connection the following observations made in *Panichella* v. *Pennsylvania Railroad Company*, 3d Cir., 252 F. 2d 452 are pertinent:

> "Thus, the procedure contemplated by Rule 54 (b) is usually more than a formality. Perhaps it can properly be viewed as mere formality, albeit an essential prerequisite of immediate appeal, in those cases where it is clear that the disposition of a portion of the litigation has been such as would clearly have constituted an appealable final judgment under Section 1291 of Title 28 before the adoption of the Rules of Civil Procedure. But otherwise and ordinarily an application for a 54 (b) order requires the trial judge to exercise considered discretion, weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present. Indeed, the draftsmen of this Rule have made explicit their thought that it would serve only to authorize 'the exercise of a discretionary power to afford a remedy in the infrequent harsh case * * *.' 28 U.S.C.A., Federal Rules of Civil Procedure, 118-119 note. It follows that 54 (b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satis-

factory disposition of litigation in the light of the public policy indicated by statute and rule? See 6 Moore, Federal Practice, 1953, 264-65."

Evaluated by the above standard the instant case was clearly not an appropriate one for entering a special order under Rule 54 (b). The prosecution of an appeal from the order dismissing the portion of the counterclaim serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation. The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal.

We conclude that the order entered under Rule 54 (b) did not constitute a proper exercise of discretion. It should be vacated so that the order dismissing the portion of the counterclaim may be restored to an interlocutory status which would permit a later appeal if occasion should arise upon final disposition of the cause.

This appeal is dismissed and the cause remanded to the District Court with directions to vacate the order entered under Rule 54 (b).

No. 12669

HASTINGS, *Chief Judge*, dissenting: In the action below, Amana filed an answer to the complaint of CBS by way of a counterclaim alleging therein three separate causes of action, designated, respectively, as the First, Second and Third "Cause of Action." The First Cause of Action alleges a violation of Section 2 (a) of the Robinson-Patman Act, 15 U.S.C.A. 13 (a), predicated on an alleged price discrimination by CBS. The Second and Third Causes of Action allege a violation of both Section 3 of the Clayton

Act and Section 1 of the Sherman Act, 15 U.S.C.A. §§ 14 and 1, predicated, respectively, on two "tying" practices engaged in by CBS: (1) The "must buy" policy, whereby each sponsor, as a condition of purchasing any television time over the CBS network, must agree to purchase such time over a specified group of television stations and is thereby denied the opportunity of choosing those stations which he deems best suited to his marketing objectives; and (2) the policy of refusing to sell network time to a prospective sponsor unless such sponsor agrees to purchase a program in which CBS has a financial interest instead of an independently-owned program of the sponsor's own choice.

The district court sustained the motion of CBS to dismiss the First Cause of Action of the counterclaim on the ground that it failed to state a claim upon which relief could be granted, that is, that Section 2 (a) of the Robinson-Patman Act is not applicable to the television network services rendered by CBS to Amana. Or, as the district court stated in its order of dismissal, "* * * the word 'commodity' as therein [15 U.S.C.A. § 13 (a)] used relates only to articles of merchandise—goods, wares and merchandise—in short, anything having the attribute of tangible existence—and cannot be construed so as to include the concept of network television time."

Following dismissal of the First Cause of Action in its counterclaim, Amana elected not to amend and moved for entry of final judgment thereon. The district court found that such First Cause of Action constituted a claim for relief separate and distinct from the other two claims in the counterclaim; that its order of dismissal constituted a final decision dispositive of such claim; that "there is no just reason for delay;" and it entered final judgment dismissing the claim with prejudice, all over objection of

CBS. The certification by the district court was made pursuant to and in full compliance with the provisions of Rule 54 (b), Federal Rules of Civil Procedure, 28 U.S.C.A. On April 27, 1959, Amana filed a timely notice of appeal from the order of dismissal.

On June 9, 1959 CBS filed its motion to dismiss this appeal on the grounds: (1) that the order below is not a "final" order within the definition of 28 U.S.C.A. §1291 and Rule 54 (b) of the Federal Rules of Civil Procedure; and (2) that the requirement of Rule 54 (b) that there be no just reason for delay is not satisfied. On June 19, 1959, our court entered an order that the motion of CBS to dismiss this appeal be continued and taken with the case on its merits. Thereafter, the case was fully briefed on its merits by both parties and on September 24, 1959, was heard by this court both on the motion to dismiss the appeal and on the merits.

The majority is moved to dispose of this appeal by granting the motion of dismissal on the second ground thereof, holding that "the District Court's determination that there was no just reason for delay was an abuse of discretion." The majority did not pass upon the first ground asserted for dismissal, i.e., whether the First Cause of Action of the counterclaim constituted a "claim for relief" within the meaning of 28 U.S.C.A. §1291 and Rule 54 (b).

I find myself in disagreement with the disposition made of this appeal by the majority. In my judgment the claim dismissed was clearly a "claim for relief" within the meaning of Rule 54 (b); and its dismissal constituted a "final decision" on that claim pursuant to 28 U.S.C.A. §1291, under the recent holdings of the Supreme Court of the United States in *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956) and *Cold Metal Process Co.* v. *United Co.*, 351 U.S. 445 (1956).

This leads us then to a consideration of whether the district court was guilty of an abuse of discretion. Mr. Justice Burton, in *Sears, Roebuck*, at page 437, said:

> "* * * But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals."

I agree that in considering this problem we cannot lose sight "of the traditional, deeply-rooted and wisely sanctioned principle against piecemeal appeals." Applying the standard announced in *Panichella* v. *Pennsylvania Railroad Company*, 3d Cir., 252 F. 2d 452 (1958), the "infrequent harsh case" rule, the majority then concludes:

> "* * * The prosecution of an appeal from the order dismissing the portion of the counterclaim serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation. The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal."

It is with this conclusion that I disagree. This case is now remanded to the district court for trial on the issues drawn on the plaintiff's principal claim for damages and defendant's remaining two claims under its counterclaim. On appeal from the result of that trial Amana may again challenge the merits of the dismissal of its first claim, as it attempted to do in the case at bar. If it is successful in

that effort, a reversal will send the case back again for a second trial with its attendant pre-trial proceedings and resulting additional delay and cost to Amana. The *possibility* of this occurrence can be avoided by the simple expedient of determining this appeal on its merits *now*.

It does not appear that real harm will result in the delay occasioned by the *disposition* of this appeal on its merits at this time. CBS admits that Amana paid $252,430.94 on its claim of $284,545.21 at the time of filing its answer, leaving the remaining disputed balance of $32,114.27 for trial on the complaint. It is shown that CBS has deferred taking depositions and requiring Amana to answer interrogatories until the conclusion of the motion to dismiss Amana's first claim.

Without in any sense indicating the disposition I would make of it, it is my judgment that a determination of this appeal on its merits at this time would serve to simplify and facilitate the conduct of the future litigation in this case, and that to fail to do so will result in hardship and unfairness to *both* parties. The case has been fully briefed and argued before us on the merits, and we will never be in better position to decide the important principal issue before us than we are at this time. To do so is to give effect to the plain import of the holding in *Sears, Roebuck & Co. v. Mackey, supra.*

I would hold that the district court did not abuse its discretion in entering its order under Rule 54 (b) and would deny the motion to dismiss this appeal and then proceed to determine the appeal on its merits at this time.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Tuesday, October 20, 1959

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. W. LYNN PARKINSON, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

No. 12669. COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff-Appellee,* v. AMANA REFRIGERATION, INC., *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that this appeal from a judgment of the said District Court entered therein on March 31, 1959, in this cause appealed from be, and the same is hereby, DISMISSED, with costs, and that this cause be, and the same is hereby REMANDED to the said District Court with directions to vacate the order entered under Rule 54-(b), in accordance with the opinion of this Court filed this day.

APPENDIX "C"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Tuesday, November 24, 1959

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. W. LYNN PARKINSON, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

No. 12669. COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff-Appellee,* v. AMANA REFRIGERATION, INC., *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that defendant-appellant's petition for rehearing in this cause be, and the same is hereby, DENIED.

APPENDIX "D"

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13 (a):

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other places under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall

prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

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MAR 14
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 710

AMANA REFRIGERATION, INC.,

Petitioner,

against

COLEMAN BROADCASTING CORP. and COLEMAN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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March 14, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

AMANA REFRIGERATION, INC., *Petitioner,* —*against*— COLUMBIA BROADCASTING SYSTEM, INC., *Respondent.*	No. 710

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the District Court are printed in the Appendix to the brief Petitioner filed with the Court of Appeals, copies of which have been filed with this Court. The opinion of the Court of Appeals is reported, *sub. nom., Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, at 271 F. 2d 257.

JURISDICTION

The judgment of the Court of Appeals was entered October 20, 1959 (Pet. B-1*). The petition for rehearing was denied by order entered November 24, 1959 (Pet. C-1). Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1) and 28 U. S. C. § 1651.

*References preceded by the designation "Pet." are to pages of Amana's petition.

QUESTIONS PRESENTED

(1) Whether this Court should review the holding of the Court of Appeals that the District Court abused its discretion in allowing an appeal under Rule 54(b) of the Federal Rules of Civil Procedure, when such holding:

(a) is within the area of review committed to the Court of Appeals by this Court's decision in *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427 (1956);

(b) does not conflict with any other decision; and

(c) is clearly correct?

(2) Whether, in any event, it is appropriate for this Court to review a substantive decision of the District Court which has not yet been reviewed by the Court of Appeals, there being no reason for departing from the usual policy of first having the benefit of consideration by that Court?

STATUTE AND RULE INVOLVED

Section 1291 of the Judicial Code (28 U. S. C. § 1291) fixes the appellate jurisdiction of the courts of appeals as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The entry of a final judgment disposing of some, but less than all, of the claims for relief asserted in an action

is governed by Rule 54(b) of the Federal Rules of Civil Procedure, which provides:

> "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

STATEMENT

Respondent, (CBS) brought this action to recover $284,545.21 from Petitioner (Amana) for services rendered by CBS in connection with broadcasts of The Phil Silvers Show under Amana's sponsorship over the CBS Television Network (App., 4-6*). Such services were rendered by CBS pursuant to two agreements: the Program Agreement which, in part, provided that CBS produce a filmed series of The Phil Silvers Show for broadcast on behalf of, and under limited license to, Amana during a stated term and at a stated price; and the Facilities Agreement, which, in part, provided that CBS would cause The Phil Silvers Show to be broadcast under Amana's sponsorship over the various television stations specified in Exhibit A thereto (R. App., 53-71).

*References preceded by the designations "App." and "R. App." are to pages of the appendices annexed to the briefs filed with the Court of Appeals by Amana and CBS, respectively. Copies of those appendices have been filed with this Court.

Amana answered and interposed a compulsory counterclaim for treble damages of $9,000,000 (App., 6-17). The counterclaim averred violation of the antitrust laws in connection with Amana's sponsorship of The Phil Silvers Show over the CBS Television Network pursuant to said Program Agreement and Facilities Agreement. The Program Agreement and Facilities Agreement are designated by Amana in paragraphs 6, 12 and 17 of its counterclaim as the "integral agreement" (App., 9, 11, and 13) and will, solely for the purpose of brevity, be so referred to herein.

Amana's counterclaim consists of three interrelated parts, each bottomed upon the same transaction or set of factual occurrences.

The basic transaction is set forth in paragraphs 2 through 7, inclusive, wherein Amana states the business of CBS and Amana (pars., 2-3*); the making of some of the terms of the Facilities Agreement, and, more particularly of the proviso that discounts to be granted shall be in accordance with the provisions of the CBS Television Network Rate Card No. 11 (par., 4); the making of the Program Agreement (par., 5); and that, pursuant to the Facilities Agreement and the Program Agreement, defendant sponsored The Phil Silvers Show on specified dates and times over the CBS Television Network (pars., 6-7). Amana makes those averments applicable to each part of its counterclaim (pars., 2, 7, 12 and 17).

The first part of Amana's counterclaim (pars., 1-10) focuses upon the basic transaction (pars., 2-7) for the purpose of charging violation of Section 2(a) of the Clayton Act, as amended (15 U. S. C. Section 13(a)), claiming CBS granted greater discounts to its "favored advertisers" than to Amana in its sponsorship of The Phil Silvers Show.

*References preceded by the designation "par." or "pars." are to paragraphs of Amana's counterclaim (App., 8-14).

pursuant to said Rate Card No. 11 (par., 8), and that the alleged differences in discounts purportedly injured Amana in violation of the antitrust laws (pars., 9 and 10).

The second part of the counterclaim (pars., 11-15) focuses upon the basic transaction (pars., 2-7) to charge violation of Section 1 of the Sherman Act (15 U. S. C. § 1), and Section 3 of the Clayton Act (15 U. S. C. § 14), by reason of an alleged requirement that Amana, as a condition of sponsorship, had to agree to undertake the sponsorship of The Phil Silvers Show over a specified group of television stations set forth in said Rate Card No. 11 (par., 13), and that said requirement violated the antitrust laws (pars., 14 and 15).

The third part of the counterclaim (pars., 16-22) focuses upon the basic transaction (pars., 2-7) to charge violation of Section 1 of the Sherman Act (15 U. S. C. § 1) and Section 3 of the Clayton Act (15 U. S. C. § 14), by reason of an alleged requirement that Amana had to agree to sponsor The Phil Silvers Show, in which CBS purportedly had a financial interest, in lieu of a program in which CBS allegedly had no such interest (pars., 18 and 20), and that such alleged requirement injured Amana and violated the antitrust laws (pars., 21 and 22).

CBS moved to dismiss the first of the three parts of the counterclaim on the ground that Section 2(a) of the Clayton Act (15 U. S. C. § 13(a)) was inapplicable to the television networking services supplied by CBS to Amana because neither the Section 2(a) requirement of "commodities", nor of "purchasers", nor of "like grade and quality" was present (App., 18-19). The District Court granted the CBS motion and entered an order of dismissal on February 17, 1959 (App., 26-27).

Thereafter, Amana applied to the District Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, for certification "that there is no just reason for

delay", and for "an express direction" for entry of final judgment (App., 27-28). CBS opposed upon the grounds that the order was not a "final decision" within the meaning of Section 1291 of the Judicial Code (28 U. S. C. § 1291), that no justifiable reason existed for review prior to final judgment on the entire case, and that, therefore, the order was not properly certifiable. On March 31, 1959, the District Court granted Amana's application for certification (App., 28-29).

On April 27, 1959, Amana filed its notice of appeal (App., 29-30). CBS moved to dismiss on the same grounds as it had urged in opposing Amana's application to the District Court and on the further ground that it was an abuse of discretion on the part of the District Court to grant the Rule 54(b) certificate.

On October 20, 1959, the Court of Appeals dismissed Amana's appeal (271 F. 2d 257). On November 24, 1959, Amana's petition for rehearing was denied (Pet., C-1).

ARGUMENT

Amana urges a grant of certiorari* by contending that (a) the Court of Appeals' decision dismissing Amana's appeal is in conflict with that in *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427 (1956) (Pet., 6-12) and (b) notwithstanding the fact that the Court of Appeals has not yet passed upon the substantive issue resolved by the District Court, it would be convenient to have this Court render an opinion in respect of the legal question determined by the District Court (Pet., 12-17).

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*Amana also asserts jurisdiction under the "All Writs" provision of 28 USC § 1651 but asks for no relief thereunder and has failed to file the motion which is required by Rule 31 of the Rules of this Court for such relief. Accordingly, that branch of Amana's application is defective and must be rejected.

I.

NO REASON EXISTS WARRANTING REVIEW OF THE DECISION OF THE COURT OF APPEALS.

This case wholly lacks the "special and important reasons" which are required for review by certiorari. Instead, it is simply an effort to get this Court to review the ruling of the Court of Appeals that the District Court abused its discretion in permitting an appeal under Rule 54(b), despite the fact that this is a matter which the Court of Appeals is required to review under *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. at 437, and in the exercise of which it has "a duty of independent judgment broader than is implied by the usual flavor of the phrase 'abuse of discretion'." (*Sears, Roebuck*, 351 U. S. at 440—concurring opinion). The holding below thus merely determined whether discretion was properly exercised under a particular set of factual circumstances, and does so in a manner consistent with the principles enunciated by this Court. It accordingly presents no important issue, or conflict of decisions, justifying review by this Court. In addition, the holding is clearly correct, not only for the reason stated below but also on the alternative and equally compelling ground that the order appealed from is not "final" within the meaning of Section 1291 of the Judicial Code.

Amana's Appeal Was Properly Dismissed.

It is now well established that Rule 54(b) fixes three separate requirements for appealability in multiple claims actions: (1) a "final" decision within the meaning of Section 1291 of the Judicial Code; (2) a proper discretionary determination "that there is no just reason for delay"; and (3) "an express direction for the entry of judgment" by the grant of the necessary certificate. *Sears, Roebuck*, 351

U. S. 427; *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.*, 243 F. 2d 795 (2d Cir. 1957); *Flynn & Emrich Company* v. *Greenwood*, 242 F. 2d 737 (4th Cir. 1957), *cert. denied*, 353 U. S. 976 (1957).

The District Court's order was not appealable because (a) a valid discretionary determination of "no just reason for delay" had not been made and (b) the order lacked "finality".

(1) The Decision Below is Correct and There is No Conflict.

The Court of Appeals held (271 F. 2d at 258) "that the District Court's determination that there was no just reason for delay was an abuse of discretion". Accordingly, Amana's appeal was dismissed, the Court stating:

> "The prosecution of an appeal from the order dismissing the portion of the counterclaim serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation. The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal." 271 F. 2d at 259.

Amana, relying upon *Sears, Roebuck*, appears to contend that the decision below is incorrect because (1) the Court of Appeals has little or no power to review, but must accept, the District Court's finding of "no just reason for delay" and (2) the only standard which the Court of Appeals could apply, in determining the propriety of the District Court's action, is whether the order appealed from is "final". In so contending, Amana not only confuses the separate requirements of "finality" and the exercise of discretion, but also inaccurately describes this Court's holding in *Sears, Roebuck*. Amana's argument might have had some colorable basis under Rule 54(b) as originally promul-

gated and, possibly, prior to this Court's decision in *Sears, Roebuck*. Today it is wholly untenable.

As originally promulgated, Rule 54(b) had but one requirement—"finality"—which was fulfilled only if the dismissed claims were based upon "differing occurrences or transactions" from those giving rise to the claims remaining for disposition. *Reeves* v. *Beardall*, 316 U. S. 283, 285 (1942). Because difficulty soon arose in applying the original rule—primarily in determining the proper timing of an appeal—Rule 54(b) was amended. *Sears, Roebuck*, 351 U. S. at 433-434. *Cf. Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507 (1950).

Amended Rule 54(b) overcame the uncertainties of the original rule by empowering the district court, in the first instance, to consider whether the order of which review was sought was (a) ready for appeal and (b) "final". *Sears, Roebuck*, 351 U. S. at 435, 437. Amended Rule 54(b) now requires the district court to manifest its conclusion by certifying "that there is no just reason for delay" and directing the entry of judgment. *Ibid.* The power thus granted was not, however, intended to in any way relax the statutory requirements of "finality" or the historic policy prohibiting piecemeal appeals. *Sears, Roebuck*, 351 U. S. at 438. Compare *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955). As stated by the Advisory Committee which formulated amended Rule 54(b):

> "The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. . . . Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created 'civil action' in order to avoid the possible injustice of a delay in judgment of a *distinctly separate claim* to await adjudication of the entire

case. It was not designed to overturn the settled federal rule stated above . . .

". . . After extended consideration, it [the Committee] concluded that a retention of the older federal rule was desirable, and that *this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule.* This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. . . ." *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 70-72 (1946) (Emphasis added.)

Shortly after amendment of Rule 54(b) a conflict of judicial views* developed among the courts of appeals. One view held that the district court's determination of "no just reason for delay" and its entry of final judgment, were conclusive, and, except where an order was too glaringly interlocutory, the courts of appeals were thereby compelled to entertain the appeal. The contrary view maintained that that interpretation would make the Rule invalid and that the Rule simply had the "negative effect" of precluding all appeals in multiple claims actions unless the district court had made the requisite certificate.

In *Mackey* v. *Sears, Roebuck & Co.*, 218 F. 2d 295 (7th Cir. 1955), the claims, dismissal of which was sought to be appealed, arose under the antitrust laws. The remaining claims were common law counts. The Court of Appeals denied a motion to dismiss the appeal and this Court granted certiorari, primarily to resolve the above-mentioned conflict of judicial views. *Sears, Roebuck*, 351 U. S. at 429. In affirming the denial of the motion to dismiss the appeal, this Court adopted the "negative effect" approach to Rule 54(b) (351 U. S. at 435, 438) and held that the District

*The bulk of the cases supporting those divergent views are cited in *Sears, Roebuck*, 351 U. S. at 429, n. 1.

Court is merely the "dispatcher", "permitted to determine, in the first instance, the appropriate *time when each 'final decision'* upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." *Sears, Roebuck*, 351 U. S. at 435.

This Court then specifically rejected the contention now urged by Amana—that the Court of Appeals is foreclosed from reviewing the propriety of the grant of the Rule 54(b) certification—stating:

> "... The District Court *cannot*, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of § 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals." 351 U. S. at 437.

The scope of the Court of Appeals' power to determine whether there had been an "abuse of discretion" was clarified in the concurring opinion of Justice Frankfurter, in which Justice Harlan joined, as follows:

> "... In other instances where a district court's ruling can be upset only for an abuse of its discretion, the scope of review is necessarily narrow. Here, in regard to the present problem, what is to come under review is a newly modified requirement of finality. But the requirement continues to be based upon a statute, *viz.*, 28 U. S. C. § 1291, and that statute defines and constricts the jurisdiction of the courts of appeals. Therefore the issue of compliance with this congressional command would, I should sup-

> pose, cast upon the courts of appeals a duty of independent judgment broader than is implied by the usual flavor of the phrase 'abuse of discretion'." 351 U. S. at 440.

Sears, Roebuck thus refutes Amana's contention that "finality" is the only requirement for Rule 54(b) certification. The "timing of such a release"—the determination whether there are any "justifiable reasons for delay"—is a further requirement, and, though it is left in the first instance for decision by the district court in the exercise of its discretion, that exercise of discretion "remains reviewable by the Court of Appeals". *Sears, Roebuck*, 351 U. S. at 437. See also *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445 at 452-453 (1956); *Panichella* v. *Pennsylvania R. R. Co.*, 252 F. 2d 452 (3d Cir. 1958). Compare, Justice Frankfurter's opinion concurring in *Sears, Roebuck* and dissenting in *Cold Metal*, 351 U. S. at 439.

Manifestly, the grant of Rule 54(b) certification is not a mere "formality" to be granted "routinely or as a courtesy or accommodation to counsel". *Panichella* v. *Pennsylvania R. R. Co.*, 252 F. 2d at 455. Section 1291 of the Judicial Code and the historic policy against piecemeal appeals compel the sparing exercise of the discretionary power of certification and the limitation of that exercise to the "infrequent harsh case". *Panichella* v. *Pennsylvania R. R. Co.*, 252 F. 2d at 454-455; *Report of Proposed Amendments to Rules of Civil Procedure For The District Courts of the United States*, 72 (1946). See also *Sears, Roebuck*, 351 U. S. at 440-441 (concurring opinion); *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 269 (3d Cir. 1952); *Lopinsky* v. *Hertz Drive-Ur-Self Systems*, 194 F. 2d 422, 427 (2d Cir. 1951) (concurring opinion); *Winsor* v. *Daumit*, 179 F. 2d 475, 476 (7th Cir. 1950).

This is not the infrequent harsh case, as the Court of Appeals carefully pointed out.

(2) The Order Sought to be Appealed is Not "Final".

Although the Court below found it unnecessary to rely thereon for its decision, Amana's appeal was subject to dismissal on still another ground. The order sought to be appealed from is not "final" within the meaning of Section 1291 of the Judicial Code. Hence, notwithstanding Rule 54(b) certification, it is not an appealable order.

This Court and the courts of appeals have repeatedly held that "finality", within the meaning of Section 1291, is not present unless the dismissed claims are founded upon a factual basis separate from and independent of the claims remaining for disposition. *Reeves* v. *Beardall*, 316 U. S. 283 (1942); *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp.*, 267 F. 2d 178 (2d Cir. 1959); *Schwartz* v. *Eaton*, 264 F. 2d 195 (2d Cir. 1959); *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.*, 243 F. 2d 795 (2d Cir. 1957); *Flynn & Emrich Co.* v. *Greenwood*, 242 F. 2d 737 (4th Cir. 1957), *cert. denied*, 353 U. S. 976 (1957); *Gold Seal Co.* v. *Weeks*, 209 F. 2d 802, 808 (D. C. Cir. 1954); *Coffman* v. *Federal Laboratories, Inc.*, 171 F. 2d 94, 96-97 (3d Cir. 1948), *cert. denied*, 336 U. S. 913 (1949).

Thus, as stated by Justice Douglas in *Reeves*:

> "The Rules make it clear that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action.' Atwater v. North American Coal Corp., 111 F (2d) 125, 126. And see Moore, op. cit., 92-101; 49 Yale L.J. 1476. . . ." 316 U. S. at 285.

Likewise, in *Sears, Roebuck*, 351 U. S. at 436, this Court stated, in substance, that "finality" is not present, when

that which is dismissed is "inherently inseparable from, or closely related to", that which remains for disposition.

Amana's claim for relief is bottomed upon one set of intertwined and closely related factual occurrences or transactions: the making of and terms of the "integral agreement" of sponsorship of The Phil Silvers Show over the CBS Television Network. Amana's sole right to relief, its standing to sue, and any claim for injury Amana may have, are based (if they exist at all) solely on that one set of facts.

However, Amana contends that it may assert separate claims for relief from which it may appeal piecemeal by focusing separately upon each of three interrelated parts of the totality of facts involved.

Amana claims: that under the "integral agreement" of sponsorship it did not receive the same discounts as others (Part 1); that under the "integral agreement" it was compelled to sponsor broadcasts of The Phil Silvers Show over a specified group of television stations (Part 2); and that in order for it to sponsor a broadcast over the CBS Television Network under the "integral agreement", it was forced to select The Phil Silvers Show because CBS had a financial interest therein (Part 3). The common thread is Amana's sponsorship of The Phil Silvers Show, the amount it was required to pay to CBS for its services in connection therewith, and the "integral agreement" pursuant to which each of those obligations was fixed.

Clearly, but one counterclaim is presented. The "central core" of facts in the counterclaim is asserted in paragraphs 2 through 7, inclusive. Amana's reallegation of that "central core" of facts in each of the three intertwined parts of the counterclaim shows the interrelationship of each of those parts. Indeed, the only difference between each part of the counterclaim is the assertion of additional paragraphs for the sole purpose of characterizing that

"central core" of facts and tailoring it to the legal theory there asserted.

The rule appears clear that an appeal will not lie when but one set of factual occurrences or transactions is asserted, although portions thereof are separated to suit differing legal theories. *U. S.* v. *New York, New Haven & Hartford R. R. Co.*, __ F. 2d __, 28 L. W. 2396 (2d Cir. Feb. 5, 1960); *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp., supra*, 267 F. 2d 178; *Schwartz* v. *Eaton, supra*, 264 F. 2d 195; *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc., supra*, 243 F. 2d 795; *Gold Seal Co.* v. *Weeks, supra*, 209 F. 2d 802; *Clark* v. *Taylor*, 163 F. 2d 940 (2d Cir. 1947). Analytically, this result follows when, as is the case here, the entire transaction remains for consideration and disposition, but with the number of legal theories urged in support of recovery reduced by one. As stated in the *Clark* case:

> "... The theory adopted in the new rules, including the pertinent rule here, 54(b), ... has been that the 'transaction' or 'occurrence' is the subject matter of a claim, rather than the legal rights arising therefrom; additions to or subtractions from the central core of fact do not change this substantial identity so as to support piecemeal appeals. See Petrol Corporation v. Petroleum Heat & Power Co. 2 Cir., 162 F. 2d 327, and cases and authorities there cited." 163 F. 2d at 942-943.

In *Cott*, 243 F. 2d at 796, the Second Circuit reaffirmed that interpretation stating that this Court in *Sears, Roebuck* did not hold that "...any variation in legal theory, ..." constitutes a separable claim based upon different transactions or occurrences. And, in the recent *New Haven* case, various statutory bases and theories for declaring a contract to be invalid were asserted in separated "counts" but, in holding the order dismissing one of those "counts"

to be interlocutory, Judge Friendly stated "... The judgment plainly was not final even as to the transactions here challenged, since other theories of liability remained".

Indeed, by its pleading, Amana concedes that the same factual occurrences are intertwined in each of the three parts of the counterclaim. The counterclaim is labeled as a single counterclaim and is referred to as such in the averments thereof (pars. 13 and 17).

Moreover, the "integral agreement" which gives rise to the counterclaim also gives rise to the complaint by which CBS seeks to recover moneys due from Amana for services rendered by CBS thereunder.

Thus, there still are before the District Court not only the claim of Amana but also the claim of CBS, both of which arise out of the same transaction or set of factual occurrences. The order sought to be appealed from is, therefore, not final. *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp., supra,* 267 F. 2d 178. Compare *United States Plywood Corp.* v. *Hudson Lumber Co.*, 210 F. 2d 462 (2d Cir. 1954); *Toomey* v. *Toomey*, 149 F. 2d 19, 20 (D. C. Cir. 1945).

II.

THE DISTRICT COURT'S DECISION IS NOT RIPE FOR REVIEW.

The Court of Appeals did not pass upon the substantive issues decided by the District Court. Hence, the District Court's decision is not ripe for review, because this Court, recognizing the advantage which is inherent in intermediate consideration of issues by the courts of appeals, has generally refused to pass on questions not considered by them. *Swanson* v. *Tracr*, 354 U. S. 114 (1957); *Owens* v. *Union Pacific R. R. Co.*, 319 U. S. 715, 724-725 (1943); *Husty* v.

United States, 282 U. S. 694, 701-702 (1931); *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 245 (1922). See also Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, 231-237, 241-242 (1951).* It is the same policy which this Court applies in granting certiorari prior to judgment by the courts of appeals only in rare cases of transcendent national importance.** Obviously, this case is not of that nature, and Amana advances no satisfactory reason why this Court should now depart from the customary policy and decide the substantive issue without first having the benefit of its consideration by the Court below.

The cases cited by Amana are not to the contrary. The courts of appeals had, in each of those cases, considered at least some of the substantive issues involved. Under such circumstances, it would not have been expedient for this Court to avoid disposition of the entire case by remanding the remaining related issues for disposition. The circumstances of this case are wholly different. For this Court to review the substantive issues decided by the District Court without giving the Court of Appeals an opportunity to pass thereon would result in disruption of orderly judicial procedure.

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*Compare also *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227 (1958); *Jung* v. *K. & D. Mining Co.*, 356 U. S. 335 (1958); *Lemke* v. *United States*, 346 U. S. 325 (1953); *Hill* v. *Hawes*, 320 U. S. 520 (1944); *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203 (1943). There this Court entertained jurisdiction of procedural questions but did not go on to review the substantive issues which the courts of appeals had not yet passed upon.

**E.g. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *United States* v. *United Mine Workers*, 330 U. S. 258 (1947); *Ex Parte Quirin* 317 U. S. 1 (1942); *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935). Even in such extraordinary cases this Court has on occasion required the issues to mature through the ordinary course of considerations by the courts of appeals. *Aaron* v. *Cooper*, 357 U. S. 566 (1958).

It is, of course, no answer for Amana to say that such action is justified simply because a nice legal question is supposedly presented, which it would be convenient for this Court to resolve "... so that the Federal courts, as well as many advertiser and media litigants, present and potential, can be apprised of the law and guide themselves accordingly" (Pet. 17). No principle is more firmly established than that this Court will not render such opinions, even where the parties join in requesting it. *Barr* v. *Matteo*, 355 U. S. 171 (1957).

Even if this Court were to grant such opinions, Amana's petition presents no sound basis therefor. Section 2(a) of the Clayton Act (15 U. S. C. § 13(a)) is by its terms limited to discriminations between "*purchasers*" of "*commodities*" of "*like grade and quality*". The legislative history and the Committee reports and debates on the floors of Congress make clear that Congress, in passing Section 2(a) did not have in mind the furnishing of services or the sale of intangibles—and services and intangibles are all that are here involved. Moreover, the cases* conclusively and uniformly establish that the District Court's decision was correct. It will be time enough for this Court to intervene if, through the normal appellate process, a conflict should ever develope on the issue.

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*E.g., *Fleetway, Inc. v. Public Serv. Interstate Transp. Co.*, 72 F. 2d 761 (3d Cir. 1934), *cert. denied*, 293 U. S. 626 (1935); *General Shale Products Corp.* v. *Struck Const. Co.*, 132 F. 2d 425 (6th Cir. 1942), *cert. denied* 318 U. S. 780 (1943); *Auto Acetylene Lights Co.* v. *Prest-O-Lite Co.*, 276 Fed. 537 (6th Cir. 1921), *cert. denied* 258 U. S. 622 (1922); *George W. Warner & Co.* v. *Black & Decker Mfg. Co.*, 172 F. Supp. 221 (E. D. N. Y. 1959); *United States* v. *Investors Diversified Servs.*, 102 F. Supp. 645 (D. Minn. 1951). See also *Nelligan* v. *Ford Motor Co.*, 161 F. Supp. 738 at 742, n. 2 (W. D. S. C. 1958), *aff'd*, 262 F. 2d 556 (4th Cir. 1959); *Scott Publishing Co., Inc.* v. *Columbia Basin Publishers, Inc.*, 1959 CCH Trade Cases, par. 69,589 (W. D. Wash. 1959).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 710

AMANA REFRIGERATION, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The ground asserted by Amana in its Petition for granting the Writ as to the Rule 54(b) question was the conflict between the decision of the Court below and the decision of this Court in the *Sears, Roebuck* case, 351 U. S. 427 (1956). See Rule 19.1(b) of the Rules of this Court. The ground asserted by Amana for granting the Writ as to the price discrimination question was the importance of this question under the federal anti-trust laws. See same Rule. CBS did not respond to these reasons for granting the Writ but instead discussed matters that are not relevant to this proceeding but nevertheless require an answer. To provide such an answer and to correct the many errors of fact and law contained in the CBS brief, Amana deems it necessary to file this reply brief.

I. The Argument of CBS Regarding the Rule 54(b) Issue.

A. The Question of Abuse of Discretion

CBS completely misstates the position and contentions of Amana on this question.

CBS states (p. 11) that Amana contended "that the Court of Appeals is foreclosed from reviewing the propriety of the grant of the Rule 54(b) certification". Amana obviously made no such contention.

CBS states (p. 8) that Amana "appears to" contend that "the only standard which the Court of Appeals could apply, in determining the propriety of the District Court's action, is whether the order appealed from is 'final'." Amana clearly made no such contention.

Having completely misstated Amana's position, CBS proceeds to answer *that* position by citing the *Sears, Roebuck* case for the obvious proposition that a district court's "certification" order is reviewable by a court of appeals.

The CBS brief thus never reaches the argument asserted by Amana (Pet. pp. 7-10), i.e., that the *standard* applied by the Court below in determining whether the district court abused its discretion conflicts with the standard laid down by this Court in *Sears, Roebuck*. This standard, as well as the three requirements of a proper Rule 54(b) order,[1] was clearly stated by this Court in *Sears, Roebuck* and was repeated verbatim by Amana in its Petition (p. 7). The test applied by the Court below—a test embodying a presumption of invalidity as to all Rule 54(b) appeals—

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1. CBS persists in confusing the interrelationship between Rule 54(b) and §1291 of the Judicial Code. If the three requirements for a valid "certification" order are met (*Sears, Roebuck*, 361 U.S. at 436, quoted on page 7 of Amana's Petition), the order is a "final decision" under Rule 54(b), and, therefore, without any *additional* requirement of finality, is appealable under §1291.

is clearly in conflict with the "inherently separable" standard adopted by this Court. From the fact that CBS chose to ignore this argument in favor of an argument which it attributed to Amana but which Amana never made, one must assume that CBS had no answer to it. The Writ should be granted to correct this conflict between the decision of the Court below and the controlling decision of this Court.

B. The Question of Separate "Claim for Relief"

The argument made by CBS under the misleading caption "The Order Sought to be Appealed is Not 'Final'" (pp. 13-16) is actually an argument on the merits of the "claim for relief" question. This question, although fully argued, was not decided by the Court below, but it was decided by Chief Judge Hastings in his dissent—in favor of Amana. As applied to the case at bar, this question is whether the appealed claim—the Robinson-Patman Act claim—is a "claim for relief" separate from the other claims involved in the case.

By discussing the merits of this issue CBS violates Rule 24.1 of the Rules of this Court which requires briefs in opposition, as well as the petitions themselves, to be limited to the reasons why the Writ should or should not be granted. However, since the issue has been raised, it is incumbent upon Amana to briefly answer the argument of CBS and correct the errors of fact and law contained in its brief.

1. The first error of CBS is its statement that Amana's three claims are based on "one set of facts" (p. 14). This is clearly not the case. The essential allegations which give rise to the price discrimination claim, apart from the injury to Amana, are as follows: (1) Amana's competitors, as well as Amana, purchased network television time from

CBS; (2) the time purchased by Amana, as well as by such competitors, was "prime" or "Class A" time; (3) CBS discriminated between Amana and such competitors with respect to charges made for such network time; and (4) competition *between Amana and its competitors* in the sale of refrigerators, freezers, etc. was thereby injured. *None of such basic factual allegations is material to the claims alleged in either the second or third cause of action.* Conversely, the basic allegations contained in the second and third causes of action—those relating to the "tie-in" practices of CBS resulting in competitive injury *among television station owners* and *television program producers*, respectively—are not remotely material to Amana's First Cause of Action.

2. The second error of CBS is its statement (pp. 14-15) that Amana's three claims represent only a difference in "legal theories". The fact is that, since the essential allegations of the price discrimination claim are entirely different from the essential allegations of the other claims involved in the action, and since the *right* asserted under Amana's first claim (the right not to be discriminated against) is entirely distinct from the rights asserted under its second and third claims (the rights not to be compelled to purchase something unwanted as a condition to purchasing something that is desired), *separate recoveries may be had by Amana under each of its three claims.* Accordingly, much more than differences in legal theory are involved:

> "A single claimant presents multiple claims for relief when his possible recoveries are more than one in number and not mutually exclusive." (Baron and Holtzoff, *Federal Practice and Procedure—Rules Edition*, Section 1193, p. 28.)

3. The third error of CBS is its misreading of the *Sears, Roebuck* case on this point, and its reliance on cases, such as *Reeves* v. *Beardall*, 316 U.S. 283 (1942), that were rendered obsolete by the 1948 amendment to Rule 54(b). The law now is that even a difference in legal theory only (i.e., a difference in the "basis of liability": *Sears, Roebuck*, 76 S. Ct. at 900, footnote 9) is sufficient, for purposes of Rule 54(b), to render a cause of action a separate "claim for relief"[2]:

> "If the District Court certifies a final order on a claim *which arises out of the same transaction and occurrence as pending claims*, and the Court of Appeals is satisfied that there has been no abuse of discretion, the order is appealable." (*Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 76 S. Ct. 904 at 909; emphasis added.)

The repudiation of the single transaction theory is also pointed up in the Baron and Holtzoff treatise, *Federal Practice and Procedure—Rules Edition*:

> "These decisions (*Sears, Roebuck* and *Cold Metal Process*), read together, certainly repudiate the suggestion that a separate claim, for purposes of Rule 54(b), is that which is 'entirely distinct from all other claims involved in the action and which arises from a different occurrence or transaction'." (Id., Section 1193, p. 28, parenthetical reference added.)

To the same effect, see also "Federal Rule 54(b): The

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2. As pointed out in Amana's Petition (footnote 1), the Second Circuit has apparently declined to follow the *Sears, Roebuck* "basis of liability" test. However, the recent case cited by CBS, *U. S.* v. *New York, New Haven & Hartford R. R. Co.* . . . F. 2d . . ., 28 L. W. 2396 (1960), was concerned with §1292 of the Judicial Code and can not, therefore, be added to the list of Second Circuit cases that are in conflict with the *Sears, Roebuck* and *Cold Metal Process* cases on this point.

Multiple Claims Requirement", 43 *Va. L. Rev.* 229 (1957). Perhaps one of the most compelling arguments for granting the Writ is the fact that CBS, and apparently the Second Circuit as well, has failed to understand the full effect of this Court's interpretation of amended Rule 54(b) in *Sears, Roebuck* and *Cold Metal Process.*

Clearly, even under the old Rule 54(b) and especially under the amended Rule as interpreted by *Sears, Roebuck* and *Cold Metal Process,* Amana's Robinson-Patman Act claim—as stated by Chief Judge Hastings—is a "claim for relief" separate and distinct from the other claims involved in the case.

II. The Argument of CBS Regarding the "Commodity" Issue.

CBS did not and could not refute the ground advanced by Amana for granting the Writ, namely, that this "commodity" issue is one of the most important unanswered questions under the federal anti-trust laws. Instead CBS argues (p. 17) that this Court should not "depart from the customary policy" of refraining from deciding an issue until the court of appeals has done so. However, judging from the certainty expressed by CBS in the last paragraph of its brief as to the correctness of the District Court's decision on the merits[3], one would think CBS would be anxious to have this Court settle that issue with finality at the first available opportunity. Such a decision, far from

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3. In Amana's Petition several recent cases involving this issue were cited, including *Beacon Newspaper Corporation, Inc.* v. *Wichita Eagle Publishing Co., Inc.*, Civil Action No. W-1937 (D. Kansas, pending). Subsequent to the filing of Amana's Petition, the district court denied, without opinion, the defendant's motion to dismiss the complaint. Such denial necessarily implies that the court is of the opinion that advertising space is a "commodity" for purposes of the Clayton Act.

being "advisory" in nature, would constitute an adjudication of a very real controversy between CBS and Amana which must ultimately, if not now, be decided by action of this Court.

CONCLUSION

For the reasons stated in Amana's Petition, and for the additional reasons stated herein, the Writ of Certiorari should be granted.

Respectfully submitted,

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